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IN THE

Supreme Court of the United States

TO THE OCTOBER TERM, 1927.

No. 42.

COMPANIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

v.

COLLECTOR OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER.

TAX ON FOREIGN INSURANCE.

Respondent's position, as stated in his brief, is:

1. That the statute under which the tax or charge complained of was exacted was within the taxing power of the Philippine Government.

2. That the statute and the charge imposed thereunder do not violate the requirement of the "Jones Law" (Organic Act of the Philippine Islands), that the rule of taxation in the islands shall be uniform.

3. "It is not unduly discriminatory against persons insuring with foreign companies since it levies

against them only the same tax of one per cent of the premiums paid which is levied upon premiums paid on insurance effected in the Philippine Islands." The contention last referred to and which we have quoted in full, is predicated upon an assumption not to be found in the pleadings, the evidence or the "Agreed Statement of Facts," viz: That the insurer would have paid, or in practice, does pay, the tax or charge imposed by the statute against the insurance company in respect of premiums by it collected for policies written in the islands.

Under the statute and on the case as made in the "Agreed Statement of Facts," those owners who place their insurance directly in a foreign country without the intervention of an agent in the islands are singled out for taxation, whereas other owners are not required to pay a tax or charge on premiums paid by them.

The position of the Government, as stated by the Attorney-General and quoted in the record (Transcript of Record, pp. 25 and 43), is thus stated: "If you insure your property with insurance companies paying taxes to me, you pay no taxes. If you insure it with companies which do not and cannot be made to pay taxes to me because they are beyond my jurisdiction, you pay the taxes that leak from my coffers on account of your act."

We think it is illogical to say that because the person primarily liable for a tax cannot be reached for the purpose of collecting it, the Government would be justified in taking the tax from another.

We cite the fallacy and the record at this point

because the whole argument of learned counsel for the Respondent, revolves around that erroneous concept of the case.

ARGUMENT.

In support of his position that the statute complained of is valid as within the taxing power of the Government of the Philippine Islands, Respondent cites the case of *Palmetto Insurance Company v. Conn,* 272 U. S. 295, decided by this Court on October 25, 1926.

It is urged that the rule therein declared is decisive of the present case. However, an examination will show that the cases differ so widely on fundamental and vital facts that the decision in one cannot control the other.

In the Palmetto case the insurance premium as to each car became due and payable only when the purchaser took delivery of his car in Ohio (the taxing state). At the same time a certificate of insurance was sent to the purchaser in the taxing state. His voluntary act of purchasing the car and accepting the insurance policy constituted an act of insurance in the taxing state. The consummation of the insurance was accomplished in that state, and of necessity the loss would be payable there. It may be fairly inferred that the only effect of the original contract between the insurance company and the automobile company was the establishment of a lower rate by provisionally promising a large number of contracts by individual purchasers of cars.

As was said by Mr. Justice Holmes, speaking for the Court, it was not the original contract between the insurance company and the Chrysler Corporation that Ohio could prohibit or lay a tax upon, even if the insured property were in Ohio. It was what the purchaser did or permitted to be done in the State of Ohio by the terms of which the insured got a benefit collectible by him in the State of Ohio that made the transaction subject to the Ohio law.

In the instant case, the petitioner, a corporation existing under the Laws of the Kingdom of Spain and with its main office in that country, maintained a branch office in the City of Manila in the Philippine Islands. The policies of insurance were taken out by the Petitioner's head office in Barcelona without the intervention of any agency in the Philippine Islands. The policies were open and running policies of insurance, one with the Guardian Assurance Company of London, England, and the other with Le Comité des Assurances Maritimes de Paris, of Paris, France. Petitioner's head office in Barcelona paid the premiums and, it is agreed, that had any losses covered by the policies occurred, they would have been paid to Petitioner's head office and not in the Philippine Islands. Both of the insurance companies were foreign corporations, the Guardian Assurance Company being licensed to do business in the Philippine Islands and having an agent there. The Paris company, on the other hand, was not licensed to do business in the Philippines and had no agent therein. The insurance now in question, however, was obtained by the Petitioner in Barcelona "without

the use of the services or intervention of any agent, company, corporation or other representative of the two aforesaid insurance companies, residing or doing business in the Philippine Islands." (The above is taken from the Agreed Statement of Facts, at pages 12 to 15, inclusive, of the Transcript of Record.) The only act that was done in the Philippine Islands was the advice by cable from Petitioner's Manila office to the head office in Barcelona of the fact that certain purchases had been made by Petitioner and were warehoused or shipped at Petitioner's order. (Agreed Statement of Facts, Section VI, page 14, Transcript of Record.)

When these notices were sent, however, the insurance contracts previously made and which were open, running policies, had already been closed and were valid and existing policies of insurance. The giving of the notice was a mere collateral matter. It was not the contract itself but an act performed pursuant to an existing contract. The case is therefore directly within the facts and is controlled by the decision of this Court in *Allgeyer, et als. v. Louisiana,* 165 U. S. 578. This case is extensively quoted in Petitioner's brief in support of the petition for Writ of Certiorari and it is therefore only necessary to say that the restraint there sought to be imposed by the State of Louisiana was held to be a violation of the Federal Constitution. We believe the same conclusion must be reached from the admitted facts in the present case. In the cited case it was stipulated that the policy of insurance was written in New York. It is here agreed that the policies of insurance were written respec-

tively in London and in Paris. The collateral matter, namely, the giving of notice within the State of Louisiana relied upon to sustain the validity of the statute there in question, is identical with the giving of notice in Manila in the present case.

Counsel for Respondent attempt to distinguish the Allgeyer case with the statement that the Louisiana Statute prohibited the particular insurance, whereas the Philippine Statute merely requires the insured to pay a tax of one per centum on the premiums paid by its head office in Barcelona on insurance effected wholly without the Philippine Islands.

The argument, in so far as it is based upon the smallness of the percentage charged, merits little consideration. Under the decision of this Court in *St. Louis Cotton Compress Company v. State of Arkansas,* 260 U. S. 346, and other cases cited in Petitioner's brief, the Government of the Philippine Islands was without authority in law to impose the charge or tax at all. On this premise the extent of the tax is of secondary importance. The thing forbidden was the tax or charge itself.

Respondent's argument that the Allgeyer case and the St. Louis Compress case may be distinguished in that they evidence "an invidious discrimination" and "a purpose to discourage insuring companies that do not pay tribute to the state" is equally unsound. The statute here under consideration definitely provides that if the insured obtains insurance in a foreign country such insured shall pay a tax of one per centum on the premiums paid, whereas if the same person had taken insurance from a company

licensed to do business in the Philippine Islands, he would not have been required to pay said tax upon the premiums paid by him. This is a palpable discrimination against a person who desires for one reason or another to place his insurance in a foreign country. The best evidence of the invidious discriminatory character of this charge is found in the above quoted statement of the Attorney-General:

> "If you insure your property with insurance companies paying taxes to me, you pay no taxes. If you insure it with insurance companies which do not and cannot be made to pay taxes to me because they are beyond my jurisdiction, you pay the taxes that leak from my coffers on account of your act."

This declaration of the Attorney General brings the case squarely within the rule announced *In re Thomas Page,* 60 Kansas 842 (47 L. R. A. 68). The Kansas Legislature had passed a law entitled—

> "An Act Providing for the Taxation of Contracts of Insurance Made with Insurance Companies not Authorized to do business in Kansas and Providing for the Enforcement Thereof."

In deciding the case, the Supreme Court of Kansas said:

> "One taxpayer has a policy written in the state by a company with authority, upon which no tax is imposed, while his neighbor has one written by an unlicensed company at Indianapolis, or other place outside of the state, which

> is subject to taxation. Taxes are uniform and equal when imposed upon all property of the same character within the taxing district, and yet here the insured pays a 10 per cent tax upon a policy written outside of the state, while his neighbor pays nothing upon a policy of equal value, and affording the same protection, because it is written within the state. Contracts of insurance written outside of the state cannot be regarded as illegal. Aside from the consideration that they may not be Kansas contracts, and are therefore beyond the reach of the legislature, the act itself contemplates that such contracts may and will be made, and when made are to be treated as property within the state, and become the subject of taxation here. This is an invidious discrimination, purposely made, and is a distinct departure from the constitutional rule of uniformity."

While the Kansas decision is not binding, we concede, upon this Court, it declares the principle that this Court has, we think, universally followed and which was given expression by the decision of this Court in the case of *St. Louis Cotton Compress Co. v. Arkansas,* 260 U. S. 346. That was a case involving the legality of a statute purporting to impose a tax of 5 per cent of the gross premiums paid for insurance upon the Company's property in Arkansas, with foreign insurance companies not licensed to do business in Arkansas. The decision of Justice Holmes is quoted at length on pages 42 and following of Petitioner's Brief. The pith of the decision is that the charge referred to was prohibitive to the extent of the payment required, and the imposition

of the tax manifested a purpose to discourage insuring in companies that did not pay tribute to the State of Arkansas. For that reason the Statute was held unconstitutional.

The only difference between the Arkansas Statute and that involved in the instant case is the difference in the amount or rate of the tax imposed, but, as before stated, the invalidity of the tax does not depend upon the amount, but upon the fact that the tax itself was imposed in violation of the established principles of law.

It is respectfully submitted that the judgment of the lower court should be reversed and relief granted to the Petitioner as prayed for in the Petition for Writ of Certiorari.

W. F. WILLIAMSON,
B. M. AIKINS,
Attorneys for Petitioner.

Dated: San Francisco, California,
October 17th, 1927.

[redacted]

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In the Supreme Court of the United States.

OCTOBER TERM, 1925

No. 1095

COMPANIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

vs.

COLLECTOR OF INTERNAL REVENUE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PRELIMINARY STATEMENT

The statement of the case appearing on pages 13 to 17 inclusive of the petition for certiorari and brief in support thereof sets forth the substance of the pleadings and sets forth in full the agreed statement of facts upon which the case was tried.

The jurisdiction of this court is invoked on three grounds (Petition 6, 10). The third ground, namely that "the lower Court erred in not holding that the cables * * * were collateral and subsequent to the creation of the principal contracts of foreign insurance" (Petition 18), does not furnish a basis for invoking the jurisdiction of this Court and will not be discussed in this brief.

SUMMARY

In opposing the petition for certiorari herein, we submit the following:

The questions involved are of local importance only.

Congress has expressly ratified and adopted the tax law complained of by the petitioner.

The tax complained of is an excise tax and is a tax which Congress has the power to impose.

Petitioner has shown no grounds for invoking the jurisdiction of this Court.

ARGUMENT

The questions involved are of local importance only.

The petition urges that this Court takes jurisdiction on the ground that the questions involved "which are of course, equally important questions of Federal law, under Amendment XIV of the Constitution * * * have never been settled by this Court * * *" (Petition 7). Were the statutes in question in this case enacted by the legislature of a state we might be prepared to concede that the settlement of the question at this time would be desirable. But the statute involved herein is an enactment of a territorial legislature deriving its powers from the Congress of the United States. The powers of that legislature and the limitations upon that power are not the same in principle as the powers and limitations of state legislatures and we believe that no decision by this Court in this case would be determinative of analagous questions arising within the continental limits of the United States. It follows that the decision in this case, if the Court should grant the petition, would be of local application only.

Congress has expressly ratified and adopted the tax law complained of by petitioner.

The law complained of was enacted by the Philippine Legislature December 15, 1914 (Petition, Appendix ii). Inasmuch as the Act of July 1, 1902 (32 Stat. 691, 712) provided "That all laws passed by the government of the Philippine Islands shall be reported to Congress * * *" (Sec. 86) it must be conclusively presumed that Congress was aware of the provisions of the tax law complained of when it enacted the Act of August 29, 1916 (39 Stat. 545). The last-named act is the existing or-

ganic act for the government of the Philippine Islands and contains the following provisions:

> "Sec. 6. That the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended or repealed by the legislative authority herein provided or by Act of Congress of the United States."

Act of August 29, 1916, supra.

The statute quoted, enacted almost two years subsequent to the enactment of the law complained of by the petitioner, unquestionably ratifies such law.

Conceding, for the sake of argument, that the Philippine Act of December 15, 1914, *supra*, was *ultra vires* as to the Philippine Legislature the power of Congress to ratify illegal enactments of such legislature is definitely settled.

Rafferty v. Smith, Bell & Co., 257 U.S., 226.

In view of the foregoing the ratification contained in section 6 of the Act of August 29, 1916, *supra*, is conclusive of this case if the law complained of be one which the Congress of the United States could itself enact in furtherance of its power to govern the Philippine Islands.

The tax complained of is an excise tax and is a tax which Congress has power to impose.

The tax is an excise upon the performance of an act and not upon the ownership of property. If the transaction taxed by the act is not performed in the manner prescribed in the statute no tax is payable.

Flint v. Stone Tracy Co., 220 U.S. 108, 152.

We believe that this proposition is definitely settled by the opinion of this Court in *United States v. Bennett*, 232 U.S. 299. In the case cited this Court held that it was within the power of Congress to impose an excise tax on the use of a foreign-built yacht owned by a citizen of the United, although such yacht, for a period of more than one year prior to the effective date of the tax law and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States. It

will be noted that in the case cited the tax was on the *use* of the property and not on the property. In other words the tax was an excise on the owner's exercise of his right to use a boat of foreign origin. In the case at bar the tax is an excise on the petitioner's exercise of his right to use a contract of foreign origin. We see no difference in principle.

Petitioner has shown no grounds for invoking the jurisdiction of this court.

The cases relied on by petitioner in support of his petition are cases in which this Court passed upon the powers and limitations of state governments. The instant case in its last analysis deals with the powers of Congress. The cases cited and discussed by petitioner have no application to Congressional powers (*United States v. Bennett, supra,* pp. 305, 306), and furnish no ground for invoking the jurisdiction of this Court.

CONCLUSION

We request that the petition be denied with costs.

A. R. STALLINGS,
Attorney for Respondent.